Public Prosecutor v Hadi Bakhshi Kheimeisari Aliasghar and another appeal

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS B-05(H)-319–06 OF 2018 AND B-05(SH)-363–07 OF 2018
YAACOB MD SAM, ABU BAKAR JAIS AND NORDIN HASSAN JJCA
17 DECEMBER 2020

Criminal Procedure — Appeal — Appeal against conviction and sentence — Appellant charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 for trafficking dangerous drugs — Appellant convicted and sentenced to life imprisonment and whipping — Whether there was break in chain of evidence — Whether appellant's defence of innocent carrier was considered — Whether appellant only had passive possession — Whether sentence ought to be replaced and substituted

This was an appeal by the appellant against conviction and sentence by the High Court ('HC') and the cross-appeal of the public prosecutor ('the respondent') against sentence meted out to the appellant. On 3 December 2014, around 3.15pm, PW3 a police officer, who was on duty at Kuala Lumpur International Airport ('KLIA'), saw the appellant pushing two trolleys. PW3 stopped the appellant and instructed the appellant to scan his bags. No incriminating image was found from the scan. PW3 then instructed the appellant to bring the bags to the Narcotics Office at the KLIA. PW3 found white powdery substance in a plastic lining in a cloth plastered inside the bags. The substance was suspected to be dangerous drugs. He then handed over the appellant and what was discovered to the investigation officer, PW5. Later PW5 sent the white powdery substance to the chemist for analysis. The chemist confirmed the substance to be methamphetamine weighing 2,856g. The appellant was convicted by the HC for a charge under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') for trafficking methamphetamine, a dangerous drug prescribed under the Act. Consequently, he was sentenced pursuant to s 39B(2A) of the Act for life imprisonment and 15 strokes of whipping. Hence, these appeals.

Held, dismissing the appeal and allowing the respondent's cross-appeal against sentence:

(1) The finding of the learned trial judge should be accepted. The two lab assistants were not involved in the analysis of the drugs in question. Thus, the court was not in agreement with the appellant with regard to this issue regarding the identity of the exhibits and also of the alleged break in chain of the exhibits. The drugs examined and analysed were not mixed up with

drugs for other cases. Besides, the appellant did not show tampering of the exhibits pertaining to the drugs on the part of the chemist. Therefore, the finding of the learned trial judge that there was no confusion with regard to the identity of the drugs as an exhibit and no break in the chain of evidence could not be cogently disputed by the appellant (see paras 28, 30 & 32).

(2) The absence of the appellant's friend ie Ali in court, the inability of the appellant to give Ali's full name to the police and the absence of proof from the Immigration Department about Ali's alleged trip to Malaysia, made even the existence of Ali in serious doubt. Not knowing the name of Ali's friend who gave the bags to him in Iran and not asking only meant that the evidence of the appellant regarding this was highly suspicious. The contention that the drugs were concealed and not visible to the naked eye, could not assist the appellant as knowledge of the drugs could be still imputed on the appellant. Not being curious and suspicious of the circumstances pertaining to the bags, would only meant the appellant chose to be wilfully blind. It was also wrong for the appellant to contend that s 114(g) of the Evidence Act 1950 on adverse inference should be inferred against the prosecution just because such tests were not done. Since there was no duty on the part of the prosecution to carry out such tests, adverse inference under that statutory provision could not be applied against the prosecution (see paras 34–36, 40 & 42).

(3) The appellant possession of the bags could not merely mean passive possession. The appellant possession of the bags would mean that he was able to restrain anyone from interfering with the possession of the bags. Further, the appellant had taken the bags from someone he did not know and wanted to give the bags again to someone he did not know in Malaysia. It was also wrong for the appellant to submit that to constitute trafficking, there must be possession accompanied by some overt act. In the circumstances, the appellant had custody and control of the bags containing the drugs. He therefore, was deemed to be in possession of the drugs. Mere possession of the bags alone without any overt act could sufficiently constitute trafficking (see paras 46–48).

(4) Both sub-ss (c) and (d) of s 39B(2A) of the Act must be satisfied because of the word 'and' between (c) and (d). It must be read as conjunctive and not disjunctive. Thus, it was not sufficient for the trial judge to find the appellant was a mere transporter of the drugs. The appellant cooperation with the police while the bags were searched could not mean that he had assisted an enforcement agency in disrupting drug trafficking activities within or outside Malaysia. Hence, the appellant should not be sentenced to life imprisonment with 15 strokes of whipping but must be meted out the death penalty pursuant to s 39B(2) of the Act upon conviction (see paras 51 & 55).

A **[Bahasa Malaysia summary**

Ini adalah rayuan oleh perayu terhadap sabitan dan hukuman oleh Mahkamah Tinggi ('MT') dan rayuan balas pendakwa raya ('responden') terhadap hukuman yang dijatuhkan kepada perayu. Pada 3 Disember 2014, sekitar 3.15 petang, PW3 seorang pegawai polis, yang bertugas di Lapangan Terbang Antarabangsa Kuala Lumpur ('KLIA'), melihat perayu menolak dua troli. PW3 menghentikan perayu dan menyuruh perayu mengimbas begnya. Tidak ada gambar yang menjejaskan dari imbasan. PW3 kemudian mengarahkan perayu membawa beg-beg itu ke Pejabat Narkotik di KLIA. PW3 menjumpai bahan serbuk putih di lapisan plastik di kain yang dilekatkan di dalam beg. Bahan tersebut disyaki dadah berbahaya. Dia kemudian menyerahkan perayu dan apa yang ditemui kepada pegawai penyiasat, PW5. Kemudian PW5 menghantar bahan serbuk putih itu kepada ahli kimia untuk analisis. Ahli kimia mengesahkan bahawa bahan itu adalah methamphetamine seberat 2,856g. Perayu dihukum oleh MT atas tuduhan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta') untuk pengedaran methamphetamine, dadah berbahaya yang ditetapkan di bawah Akta. Akibatnya, dia dijatuhkan hukuman berdasarkan s 39B(2A) Akta penjara seumur hidup dan 15 kali sebatan. Oleh itu, rayuan ini.

Diputuskan, rayuan ditolak dan membenarkan rayuan balas terhadap hukuman:

(1) Penemuan hakim bicara yang bijaksana harus diterima. Kedua-dua pembantu makmal tidak terlibat dalam analisis dadah tersebut. Oleh itu, mahkamah tidak bersetuju dengan perayu dalam hal ini mengenai identiti ekshibit dan juga dakwaan pemutusan dalam rantai ekshibit. Dadah yang diperiksa dan analisis tidak dicampur dengan dadah untuk kes lain. Selain itu, perayu tidak menunjukkan gangguan terhadap ekshibit berkaitan dengan dadah pihak kimia. Oleh itu, penemuan hakim bicara yang bijaksana bahawa tidak ada kekeliruan berkaitan dengan identiti dadah sebagai ekshibit dan tidak ada pemutusan dalam rantai keterangan tidak dapat dipertikaikan oleh perayu (lihat perenggan 28, 30 & 32).

(2) Ketiadaan rakan perayu iaitu Ali di mahkamah, ketidakmampuan perayu untuk memberikan nama penuh Ali kepada polis dan ketiadaan bukti dari Jabatan Imigresen mengenai dakwaan perjalanan Ali ke Malaysia, menjadikan kewujudan Ali dalam keraguan serius. Tidak mengetahui nama rakan Ali yang memberikan beg itu di Iran dan tidak bertanya hanya bermaksud bahawa keterangan perayu mengenai perkara ini sangat mencurigakan. Dakwaan bahawa dadah tersebut disembunyikan dan tidak dapat dilihat oleh mata kasar, tidak dapat membantu perayu kerana pengetahuan mengenai dadah tersebut masih boleh dianggap kepada perayu. Tidak ingin tahu dan curiga dengan keadaan yang

berkaitan dengan beg itu, hanya bermaksud perayu memilih untuk membutakan dirinya secara sengaja. Adalah salah juga bagi perayu untuk mengatakan bahawa s 114(g) Akta Keterangan 1950 mengenai anggapan menentang harus disimpulkan terhadap pihak pendakwaan hanya kerana ujian seperti itu tidak dilakukan. Oleh kerana tidak ada kewajiban pihak pendakwaan untuk melakukan pengujian seperti itu, anggapan menentang di bawah peruntukan undang-undang tersebut tidak dapat diguna pakai terhadap pihak pendakwaan (lihat perenggan 34–36, 40 & 42).

(3) Milikan beg oleh perayu bukan hanya bermaksud milikan pasif. Pemohon yang memiliki beg itu bermaksud bahawa dia dapat menahan siapa pun daripada mengganggu milikan beg tersebut. Tambahan lagi, perayu telah mengambil beg dari seseorang yang tidak dikenalinya dan ingin memberikan beg itu semula kepada seseorang yang tidak dikenalinya di Malaysia. Adalah salah juga bagi perayu untuk menyatakan bahawa untuk menjadi pengedaran, mesti terdapat milikan yang disertai dengan beberapa tindakan terang-terangan. Dalam keadaan itu, perayu mempunyai hak penjagaan dan kawalan terhadap beg yang berisi dadah tersebut. Oleh itu, dia dianggap memiliki dadah tersebut. Hanya memiliki beg sahaja tanpa tindakan terang-terangan dapat menjadi pengedaran (lihat perenggan 46–48).

(4) Kedua-dua sub-ss (c) dan (d) s 39B(2A) Akta mesti dipenuhi kerana perkataan 'dan' antara (c) dan (d). Ia mesti dibaca sebagai konjunktif dan bukan disjunktif. Oleh itu, adalah tidak memadai bagi hakim bicara untuk menemui bahawa perayu hanyalah pembawa dadah. Kerjasama perayu dengan polis ketika beg-beg itu digeledah tidak bererti bahawa dia telah membantu sebuah agensi penguatkuasaan dalam mengganggu aktiviti pengedaran dadah di dalam atau di luar Malaysia. Oleh itu, perayu tidak boleh dihukum penjara seumur hidup dengan 15 kali sebatan tetapi mesti dijatuhkan hukuman mati menurut s 39B(2) Akta jika sabit kesalahan (lihat perenggan 51 & 55).]

Cases referred to

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
Gunalan a/l Ramachandran & Ors v PP [2004] 4 MLJ 489, CA (refd)
Hoh Bon Tong v PP [2010] MLJU 2184; [2010] 5 CLJ 240, CA (refd)
Mohamad Sofri bin Che Ani v PP [2010] 6 MLJ 353; [2009] 5 CLJ 552, CA (refd)
Mohd Zaiham bin Mislan v PP [2009] 6 MLJ 737, FC (folld)
Munusamy v PP [1987] 1 MLJ 492; [1987] 1 CLJ 250, SC (refd)
PP v Abuchi Ben James and another appeal [2015] MLJU 2186; [2015] 8 CLJ 1011, CA (distd)
PP v Badrulsham bin Baharom [1988] 2 MLJ 585 (folld)

Pendakwa Raya lwn Herlina Purnama Sari [2016] MLJU 1824; [2017] 1 MLRA 499, FC (refd)
Qui Jieru v PP and another appeal [2020] MLJU 821; [2020] 1 LNS 744, CA (refd)
Teh Hock Leong v PP [2010] 1 MLJ 741, FC (refd)
Zaliman bin Zakaria v PP [2020] MLJU 1409; [2020] 1 LNS 1259, CA (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 37(d), 39B(1)(a), (2), (2A)
Evidence Act 1950 ss 8, 9, 90A, 114(g)

Appeal from: Criminal Trial No 45A-119–10 of 2015 (High Court, Shah Alam)

Rajpal Singh (Y Seelan and Tiew Poh Nee with him) (Rajpal, Firah & Vishnu) for the appellant.
How May Ling (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abu Bakar Jais JCA:

INTRODUCTION

[1] This is an appeal by the appellant Hadi Bakhshi Kheimeisari Aliasghar against conviction and sentence by the High Court ('HC') and the cross-appeal of the respondent public prosecutor against sentence meted out to the appellant.

[2] The appellant was convicted by the HC for a charge under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') for trafficking methamphetamine, a dangerous drug prescribed under the Act. Consequently, he was sentenced pursuant to s 39B(2A) of the Act for life imprisonment and 15 strokes of whipping.

THE AMENDED CHARGE

[3] The amended charge against the appellant reads:

> Bahawa kamu pada 3/12/2014, jam lebih kurang 3.15 petang, di Kawasan Ketibaan Antarabangsa, Aras 3, MTB KLIA Sepang, di dalam daerah Sepang, dalam Negeri Selangor, telah mengedar dadah seberat 2856.0 gram Methamphetamine dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

THE PROSECUTION'S CASE

[4] On 3 December 2014, around 3.15pm, PW3 a police officer, was on duty at Kuala Lumpur International Airport ('KLIA'). He saw the appellant pushing two trolleys. On each trolley was a roller bag. Appellant seemed suspicious as he stopped a few times and was looking around while pushing the trolleys. PW3 stopped the appellant and asked for his passport. Appellant had an Iranian passport. PW3 instructed the appellant to scan his bags. No incriminating image was found from the scan. PW3 then instructed the appellant to bring the bags to the Narcotics Office at the KLIA. The first bag, grey in colour was inspected by PW3. PW3 found a cloth was plastered inside the bag. He tore the cloth and found a blue plastic lining. In it, he found white powdery substance and he put the substance in two transparent plastics. PW3 then inspected the second bag, chocolate in colour. In the bag, similar cloth and lining were found. In the lining, white powdery substance was also found and he similarly put the substance in a transparent plastic. The substance was suspected to be dangerous drugs. PW3 then prepared a search list and lodged a police report. He then handed over the appellant and what was discovered to the investigation officer, PW5. Later PW5 sent the white powdery substance to the chemist for analysis. The chemist, PW4 confirmed the substance to be methamphetamine weighing 2,856g.

FINDINGS OF TRIAL JUDGE AT THE END OF PROSECUTION'S CASE

[5] The HC followed *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85 to evaluate the credibility and reliability of the evidence tendered to determine whether the elements of the offence had been established. The case law was also followed in determining if the appellant had remained silent, would there be sufficient evidence for his conviction. If a conviction could then ensue, a prima facie case is proven for the appellant to enter his defence.

[6] The appellant had custody of the bags and the drugs were concealed in those bags. The appellant also knew of the drugs. He was nervous when PW3 stopped him. That reaction showed the appellant knew of the drugs in the bags. His personal belongings were also found in the bags. Following the Federal Court case of *Mohd Zaiham bin Mislan v Public Prosecutor* [2009] 6 MLJ 737 on the state of the appellant being nervous and uneasy, this is relevant and admissible under s 8 of the Evidence Act 1950 ('the EA'). Also relevant is s 9 of the EA for the appellant to explain the drugs found in the bags.

A [7] The issue raised that there was no DNA and fingerprints test done in respect of the bags and drugs could not negate the custody, control and knowledge of the appellant and the evidence tendered had proven the elements of the offence. Following the case of *Public Prosecutor v Badrulsham bin Baharom* [1988] 2 MLJ 585, the absence of the tests could not assist the B appellants as sufficient evidence have been tendered by the prosecution.

[8] The evidence of the chemist PW4 was also accepted. She had done the test personally on the drugs and it was not true that others were the ones doing the actual test. The test had been explained by the chemist and her findings that C the drugs were methamphetamine with the weight of grams were accepted by the HC. The other issues raised by the appellant against the chemist including calibration of the machine, vials of this case being mixed with vials of other cases and no certification pursuant to s 90A of the EA had all been answered by D the chemist in court. There was also no break in the chain of exhibits in this case.

[9] The appellant had custody, control and knowledge of the drugs based on the evidence tendered by the prosecution at the end of the prosecution's E case. The HC was of the finding that based on the evidence tendered by the prosecution, a prima facie case had been established and therefore called for the appellant to state his defence.

THE DEFENCE

F

[10] The appellant came to Malaysia from Iran to buy spare parts and electronic goods from his Iranian friend, DW2 in Malaysia. In Iran, before his flight to Malaysia, his friend Ali Dalvand ('Ali') requested the appellant to carry two bags to Malaysia. A friend of Ali then met the appellant and gave the two G bags to the latter in Iran. The appellant opened the bags and found nothing suspicious in the bags. Ali told him that in Malaysia, these bags were to be handed over to another friend of Ali.

[11] The appellant was not aware that the drugs were concealed in the hard H lining at the inner sides of the bags. The appellant wanted to explain to the authorities that the bags were supposed to be given to Ali's friend who would meet him at KLIA. He could not do this as there was no Persian interpreter when he was arrested at the airport. He later telephoned his father in Iran and told him about Ali so that the authorities in Iran could arrest Ali. The appellant I asserted that he is an innocent carrier of the drugs.

[12] DW2 who testified for the appellant gave evidence that he has lived in Malaysia for a few years. He was also involved in the business of selling electronic goods and spare parts. He knew the appellant for a number of years

and the appellant had contacted him as the appellant wanted to buy electronic goods and spare parts in Malaysia because of the American embargo in Iran. The appellant came to meet him a few times to buy spare parts and at least twice, the appellant came with Ali.

FINDINGS OF TRIAL JUDGE AT THE END OF DEFENCE

[13] The appellant could not give the name of Ali's friend who gave the bags to him in Iran before he took the flight to Malaysia. He also could not give Ali's friend's telephone number. He also could not give Ali's telephone number. The appellant said these numbers were in his two handphones (exhs P17G and P17H). But he could not open his handphones as he had forgotten the pin numbers of his own handphones. He tried several times in court to open his handphones but still could not do it as he could not remember the pin numbers. The learned trial judge found this explanation of the appellant as unacceptable.

[14] According to the appellant, in Iran, he had asked Ali what is the name of Ali's friend in Malaysia. He also asked Ali how he would recognise Ali's friend in Malaysia. Ali said his friend had been told of the appellant's appearance and he would call out the appellant's name when the appellant arrived at the arrival gate at KLIA. Ali told the appellant that his friend would take the two bags from the appellant then. The learned trial judge also did not accept the testimony of the appellant in this regard. The learned judge found this testimony is a fabrication of the appellant because it would have been much easier for Ali at least to give his friend's name in Malaysia to the appellant. Ali could also give his friend's address and telephone number to the appellant so that the bags will not be given to someone else. Since the appellant could not show these particulars of Ali's friend when he was arrested, his testimony was not accepted.

[15] The appellant also failed to give Ali's full name in his statement to the police (exh D24) soon after he was arrested. This is despite that the appellant said he came to Malaysia twice with Ali. The appellant only said Ali's full name is Ali Dalvand when the appellant testified in court. This is after five years he was arrested. The learned trial judge did not accept this evidence as the appellant could have given Ali's full name in D24 when it was still fresh in his mind but did not do so. Therefore the learned trial judge found this to be an afterthought of the appellant.

[16] It was also of no assistance or relevance for the appellant to raise IDD25, as this was not tendered in court as an exhibit. IDD25 is the police report in Iran allegedly made by the appellant's father purportedly indicating the existence of Ali. Since this police report was only for identification and not

A marked as an exhibit, the trial judge did not accept IDD 25 as evidence. After all, the appellant's father never testified in court with regard to IDD25.

[17] The learned trial judge also found that in IDD25, it is stated that the two bags contained crumbs and sweets. But when the appellant testified in B court, he said when he inspected the contents of the bags, there were only clothes and nuts. Thus, even if IDD25 is admitted as exhibit and evidence, IDD25 would be contradictory to the testimony of the appellant in court.

C **[18]** As stated, the appellant testified that in the bags were clothes and nuts but the search list tendered by the prosecution, P12 does not indicate nuts were discovered in the bags. The learned trial judge, therefore, found that the contradiction with regard to the nuts in the bags was the result of pure creation of the appellant.

D **[19]** The evidence from the appellant that Ali had wanted to come to Malaysia but could not do so because Ali's uncle had just passed away, was merely hearsay. It could not be accepted as Ali did not testify. Without the testimony of Ali himself, there was no way to verify what was said of him by the E appellant.

[20] The evidence of the appellant and DW2 that the appellant came to Malaysia to buy spare parts and electronic goods and basically for business also could not be accepted. There was no documentary proof of this fact. The F appellant testified before coming to Malaysia, he had sent to DW2 a complete list of goods he required. This was for DW2 to get it for him before his arrival. However in court, no such document was shown. The appellant said the document was available in Iran. There was no such document produced here although the worth of the goods was between RM15,000 to RM30,000 G according to the appellant. The amount was quite substantial to the learned trial judge and therefore such document must surely be available here as the appellant came to Malaysia for business. The learned trial judge therefore did not accept this evidence.

H **[21]** DW2 said he made the orders for the spare parts from Proton and Toyota. Yet no documents were produced by DW2 to prove this. DW2 said he did not keep these documents as the orders were made some time ago. But these documents could be obtained from these companies if indeed the evidence of DW2 was to be believed. Not producing these documents only showed that I DW2 was an interested witness purely to assist the defence of the appellant without basis.

[22] With regard to the contention that the appellant was an innocent carrier who had followed the instructions of the police when he arrived at KLIA and

did not attempt to run away, the learned trial judge found that this does not mean that the appellant had no knowledge of the drugs. The learned trial judge had followed the Federal Court case of *Teh Hock Leong v Public Prosecutor* [2010] 1 MLJ 741 that expressed the view as the drugs were carefully concealed, an accused person docile conduct would not mean an absence of knowledge of the drugs.

[23] To the learned trial judge, what was needed to be proven was only the appellant had custody and control of the drugs and knowledge of the same. There was no duty for the prosecution to prove ownership of the drugs, although the appellant said the drugs belonged to Ali. The appellant was not an innocent carrier as he had the bags with him and he had knowledge of the contents of the same including the drugs.

[24] The learned trial judge subjected the evidence adduced on maximum evaluation to find that the case had been proven beyond reasonable doubt against the appellant. The defence of the appellant was nothing more than mere denial.

[25] As for sentence, the learned trial judge found that the appellant was only a mere transporter of the drugs. The appellant also had fully cooperated with the police when the bags were inspected. Therefore the learned trial judge sentenced the appellant to life imprisonment pursuant to s 39B(2A) of the Act from the date of arrest and 15 strokes of whipping.

GROUNDS OF APPEAL AND CROSS-APPEAL

[26] In the written submissions and oral submissions, the appellant raised three grounds of appeal as follows:

(a) break in the chain of evidence (chemist);

(b) defence of innocent carrier; and

(c) passive possession.

For the cross-appeal on sentence, the respondent contended that upon conviction, the appellant could not escape the death penalty. Based on the circumstances of the case, there is no reason for the learned trial judge to impose life imprisonment on the appellant with 15 strokes of whipping.

OUR DECISION

Break in the chain of evidence (chemist)

[27] First, in respect of this ground, the appellant contended the vials for the drugs analysis was left overnight without supervision. These vials were not put in a vault ('bilik kebal') for safe keeping. Second, the appellant submitted that the vials were mixed with other vials in the machine used for the analysis. Third, the drugs analysis was not done by the chemist. Instead the analysis were done by two lab assistants. What was sought to be done by the appellant in this regard was to tailor the finding in the Court of Appeal case of *Public Prosecutor v Abuchi Ben James and another appeal* [2015] MLJU 2186; [2015] 8 CLJ 1011 to the facts of the present case. In this case, the Court of Appeal found that the analysis of the drugs were done by two other science officers (essentially assistants to the chemist). It was done not by the chemist. Therefore it was decided that rightly the accused had been acquitted and discharged by the High Court. It was held as follows:

> Based on the evidence of SP1, it was clear that two science officers calibrated the machines used for the GCMS and GCFID tests. They were given the samples by SP1 for analysis and they operated the machines. Following that, they gave the printout from the machines to SP1. Hence, there remained a doubt as to whether the analysis was done by the science officers or by SP1. If the analysis was done by the science officers, the evidence of the chemist was vitiated and the ingredients of the charge had not been proved.

[28] However we are of the considered view, the facts of the above case is not similar to the facts of the present case. In the present case, the finding of the learned trial judge that PW4 had said clearly that the analysis was conducted by her and she was the only one conducting the analysis, should be accepted (p 59, Vol 2A, appeal record). The two lab assistants mentioned were merely operating the machine, essentially to calibrate the machine and to get the result of the analysis only. They were merely assisting to get the result ie the print out from the machine and pass that result to PW4. For that purpose, the two assistants were not involved in the analysis of the drugs in question. Thus, on this score, we are not in agreement with the counsel for the appellant with regard to this issue regarding the identity of the exhibits and also of the alleged break in chain of the exhibits.

[29] Besides, the evidence of the chemist on the analysis that had been done should be accepted and not made an issue at this stage. In support of this proposition, the Court of Appeal case of *Mohamad Sofri bin Che Ani v Public Prosecutor* [2010] 6 MLJ 353; [2009] 5 CLJ 552 states as follows:

> In the instant appeal the trial judge has appraised the four phases of analysis undertaken to identify the nature of the drugs and the quality and quantity of the drugs. We find that in the total absence of evidence to the contrary the contention of counsel for the defence is hollow especially when those decision have been further fortified at the appellate stage by the decision in *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85 in which Augustine Paul (now FJ)

stated, inter alia:

> The second part of the submission of counsel relates to the nature of the evidence that must be adduced from the chemist. It is true that the chemist did not give any evidence of the tests carried out by him in arriving at his conclusion. *It has been held by the trilogy of the (then) Supreme Court cases of Munusamy v Public Prosecutor [1987] 1 MLJ 492, Public Prosecutor v Lam Sam [1991] 3 MLJ 426 and Khoo Hi Chiang v Public Prosecutor [1994] 1 MLJ 265; [1994] 2 CLJ 151 that the court is entitled to accept the evidence of the chemist on its face value without the necessity for him to go into details of what he did in the laboratory step by step unless it is inherently incredible or the defence calls evidence in rebuttal by another expert.* The rationale of this view is lucidly explained in *Khoo Hi Chiang v Public Prosecutor* [1994] 1 MLJ 265; [1994] 2 CLJ 151 where it was held that the evidence of a chemist on dangerous drugs analysed by him is one of fact and not of opinion. In the circumstances the evidence of a chemist is not controlled by s 51 of the Evidence Act 1950 thereby making it unnecessary for him to testify on the tests conducted by him in arriving at his conclusion. The evidence of the chemist is therefore sufficient. The trial judge had accepted it. The defence did not seriously challenge the evidence beyond merely putting to the chemist that his analysis was improper and inadequate. The chemist disagreed with the suggestion. This submission of counsel cannot therefore be sustained. (Emphasis added.)

[30] There was also no break in the chain of evidence as contended by the appellant as the drugs examined and analysed were not mixed up with drugs for other cases. The drugs have been labelled accordingly and there was no confusion with respect to the vials being put in the machine for analysis. Besides, the appellant did not show tampering of the exhibits pertaining to the drugs on the part of the chemist. In the Court of Appeal case of *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 489 it is stated as follows:

> First, by way of a general observation, I am of the view that, in a drug trafficking case what is important is that it must be proved that it is the substance that was recovered that was sent to the chemist for analysis and it is that same substance that is found to be heroin or cannabis etc and it is in respect of that substance that an accused is charged with trafficking. So, the chain of evidence is more important for the period from the time of recovery until the completion of the analysis by the chemist. Even then it does not necessarily mean that if the exhibit is passed from one person to another, every one of them must be called to give evidence of the handing over from one person to another and if there is a break, even for one day, the case falls. There should be no confusion between what has to be proved and the method of proving it. What has to be proved is that it is the substance that was recovered that was analysed by the chemist and found to be heroin, cannabis etc, and it is for the trafficking of that same substance that the accused is charged with.
>
> *The proof of the chain of evidence is only a method of proving that fact. The fact that there is 'a gap', does not necessarily mean that that fact is not proved. It depends on the facts and circumstances of each case. There may be a gap in the chain of evidence. But,*

A *if for example, during that 'gap' the exhibits are sealed, numbered with identification numbers, there is no evidence of tempering, there is nothing that would give rise to a doubt that that exhibit is the exhibit that was recovered in that case and that was analysed.* (Emphasis added.)

B **[31]** On the contention of the appellant that there was a mixed up of vials in this case and another case, PW4 the chemist testified and explained there was no probability of a mixed up and the oral evidence of PW4 is as follows:

C S: Peguam mencadangkan bahawa terdapat mixed up antara vial-vial bagi kes ini dengan vial-vial kes lain dan Dr tidak setuju. Kenapa tidak setuju?

J: Vial-vial ditempatkan pada peralatan tersebut pada kedudukan yang berbeza di mana setiap vial telah ditandakan dengan nombor makmal tersendiri dan analisis yang dilakukan oleh peralatan tersebut adalah mengikut kedudukan vial-vial tersebut di mana analisis dilakukan secara berasingan, pada waktu yang berbeza. Oleh yang demikian, tiada kemungkinan untuk berlaku keadaan mixed up vial dalam menjalankan analisis ini.

D

[32] Therefore, the finding of the learned trial judge that there was no confusion with regard to the identity of the drugs as an exhibit and no break in the chain of evidence, with respect, could not be cogently disputed by the appellant.

E

Defence of innocent carrier

F **[33]** On this ground, the appellant submitted that the learned trial judge did not consider the appellant's defence of being an innocent carrier thoroughly. This the appellant submitted includes the following:

(a) the appellant came to Malaysia previously with his friend Ali who was also involved in a similar kind of business as the appellant;

G

(b) the appellant was asked to bring two bags which belonged to Ali, who could not make the trip to Malaysia as his uncle had passed away;

(c) the appellant was asked to deliver both bags to Ali's friend who will be waiting at the Malaysian airport; and

H

(d) it is to be noted the appellant checked both the bags before receiving it from Ali's friend. On the surface, the bag did not contain any incriminating substance. The bags had looked normal. The bags did not seem to be modified through the naked eye.

I

[34] With regard to the first contention above, the first point to note is that Ali did not testify. Therefore Ali could not corroborate the appellant's evidence. Second, when the appellant gave his statement to the police, he said he did not know the full name of Ali. He gave Ali's full name only when he testified in

court and he knew this after his father purportedly gave Ali's full name. This could not be true because when DW2 testified, he said the appellant met him with Ali and DW2 gave Ali's full name as Ali Dalvand. DW2 met the appellant and Ali purportedly before the appellant gave his statement to the police and before the appellant testified in court. If this is indeed the case, surely the appellant will be able to give Ali's full name when the appellant gave his statement to the police. Third, no Immigration Officer was called to prove that Ali had ever been to Malaysia. The Immigration Department, using its records could always prove if any foreigner had ever been to Malaysia. The absence of Ali in court, the inability of the appellant to give Ali's full name to the police and the absence of proof from the Immigration Department about Ali's alleged trip to Malaysia, make even the existence of Ali in serious doubt.

[35] With regard to the second, third and fourth contentions above, first the appellant did not even know the name of Ali's friend who gave the bags to him in Iran. The very least, the appellant should know his name or at least ask for his name. Not knowing this and not asking only mean that the evidence of the appellant regarding this is highly suspicious. Besides, nobody would nowadays dare carry bags and the likes to a foreign country over thousands of miles, especially from someone they do not know. And in this regard, the appellant is a savvy businessman and not someone from the backwaters of Iran, too naive on the criminal intents of others. On the same note, in the Court of Appeal case of *Qui Jieru v Public Prosecutor and another appeal* [2020] MLJU 821; [2020] 1 LNS 744, it is stated as follows:

> Besides nowadays when widespread news reports have highlighted the incidents of drugs and contrabands been concealed in bags and the likes, it is most difficult to believe that the appellant would fall prey to such acts.

[36] On the fourth contention above too ie the drugs were concealed and not visible to the naked eye, such contention could not assist the appellant as knowledge of the drugs could be still imputed on the appellant. This is consistent with the Federal Court case of *Teh Hock Leong v Public Prosecutor* [2010] 1 MLJ 741 where the following is stated:

> The method employed to convey or transport a drug may sometimes furnish evidence of knowledge. *For example, an attempt to carefully conceal a drug may indicate an intention to avoid detection and hereby point to knowledge.* Of course it all depends on the facts of each individual case. (Emphasis added.)

[37] In raising this defence of being an innocent carrier, the appellant also contended that he was not wilfully blind. These two concepts of being an innocent carrier and not wilfully blind are closely connected. In the Court of Appeal case of *Hoh Bon Tong v Public Prosecutor* [2010] MLJU 2184; [2010] 5 CLJ 240, the two are said as follows:

A The defence of innocent carrier must necessarily bring into the picture the concept of wilful blindness.

[38] A case explaining wilful blindness is the Federal Court's case of *Pendakwa Raya lwn Herlina Purnama Sari* [2016] MLJU 1824; [2017] 1 B MLRA 499 that states as follows:

> Wilful blindness necessarily entails an element of deliberate action. *If the person concerned has a clear reason to be suspicious that something is amiss but then embarks on a deliberate decision not to make further enquiries in order to avoid confirming what the* C *actual situation is, then such a decision is necessarily a deliberate one. The key threshold element in the doctrine of wilful blindness itself is that of suspicion followed by (and coupled with) a deliberate decision not to make further investigations.* (Emphasis added.)

D **[39]** Having regard to what is stated above and juxtaposing the same with the fact of the present case, wilful blindness on the part of the appellant can be deduced as follows:

(a) accepting the two bags in Iran from a purported friend of Ali who is not known to the appellant;

E

(b) not checking the background of this person who gave the bags to him;

(c) taking the bags without knowing the details and particulars of Ali's purported friend in Malaysia who supposed to get the bags; and

F (d) not being doubtful and ignoring the suspicious circumstances before the bags were supposed to be handed over to Ali's purported friend in Malaysia.

[40] The above facts are too obvious and glaring, rendering the contention of G the appellant that the drugs could not have been detected at first glance, as of little significance. Even if it is true the drugs could not be seen by the naked eye, the manner the bags were accepted in Iran and carried all the way to Malaysia to be handed over to another unknown person, must or should have aroused serious suspicion on the part of the appellant. Not being curious and suspicious H of the circumstances pertaining to the bags, would only mean the appellant chose to be wilfully blind.

[41] There is also no basis for the appellant to contend that he should be considered an innocent carrier just because there was no DNA and finger print I tests done on the drugs and the bags. In the first place, there is no requirement for such tests to be done. If there are other sufficient evidence to convict the appellant, the tests mentioned should only be considered as corroborative evidence. The case of *Public Prosecutor v Badrulsham bin Baharom* illustrates the same point and where it states as follows:

> In the present case, the prosecution had clearly established that the accused was in actual physical custody and control of P3 and its contents. From the totality of the evidence, the prosecution had also clearly established that the accused had the necessary knowledge of P6A-H and the nature of the dangerous drugs in question. *In the circumstances, I cannot find fault with the police for failing to send the exhibits to the chemist in order to carry out finger print tests. The contention of the learned defence counsel, with due respect, amounts to nothing more than to ask this court to determine not whether there was sufficient evidence adduced before this court to warrant a conviction of the accused but to determine that the methodology of the police investigation must be 100% correct regardless of the fact that the police had gathered more than sufficient evidence to sustain a conviction of the accused. I cannot lend a judicial countenance to such a contention.* (Emphasis added.)

[42] It is with respect also wrong for the appellant to contend that s 114(g) of the EA on adverse inference should be inferred against the prosecution just because such tests were not done. Since there is no duty on the part of the prosecution to carry out such tests, adverse inference under that statutory provision could not be applied against the prosecution.

[43] Besides the adverse inference pursuant to this statutory provision could only be applied if there is suppression or withholding of evidence and not merely on account of not having such evidence available (see Supreme Court case of *Munusamy v Public Prosecutor* [1987] 1 MLJ 492; [1987] 1 CLJ 250).

Passive possession

[44] For this ground, it is relevant to note that at para 50 of the appellant's own written submission, the following is stated:

> Even though the defence of passive possession was not canvassed, his Lordship must consider whether the defence of passive possession was available to the appellant.

[45] At para 51 of the appellant's written submission, the appellant further submitted mere possession of the two bags would at the most, show passive possession only. According to the appellant, to constitute trafficking there must be possession accompanied by some overt act.

[46] With respect, we do not think the appellant's submission above is correct. First, the appellant possession of the bags cannot merely mean passive possession. The appellant possession of the bags would mean that he is able to restrain anyone from interfering with the possession of the bags. In fact, it would only be foreseeable that the appellant would stop anyone from meddling with the bags. This shows it is not true that the appellant had only passive possession. Second, it is not true that the appellant had only passive possession of the bags when the totality of evidence is considered. This would include that

Ali's existence is seriously in doubt. Further, the appellant had taken the bags from someone he does not know and wanted to give the bags again to someone he did not know in Malaysia. Tested against the evidence here, the submission that the appellant only had passive possession of the bags is far from the truth. The possession of the bags must not be evaluated in isolation. The possession of the bags must be evaluated together with other evidence tendered before the trial court. Taking the whole evidence, with respect, it is untrue the appellant only had passive possession of the bags.

[47] With respect, it is also wrong for the appellant to submit that to constitute trafficking, there must be possession accompanied by some overt act. Despite this submission, the appellant could not show any case law supporting his submission. In fact, there is no requirement for overt act to always be proven for a charge of trafficking of the drugs. On the contrary, possession of anything containing the drugs because of custody and control of the same, could constitute trafficking without the need of any overt act on the part of an accused person. This proposition in fact is reflected and supported by s 37(d) of the Act that states as follows:

> In all proceedings under this Act or any regulation made thereunder —
>
> ...
>
> (d) any person who is found to have had in his custody or under his control *anything whatsoever containing any dangerous drug shall,* until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug;
>
> ... (Emphasis added.)

[48] Taking note of the above statutory provision and the facts of the present case, the appellant had custody and control of the bags containing the drugs. He therefore, is deemed to be in possession of the drugs. There is absolutely no requirement of an overt act for him to be found of trafficking of the drugs, considering this provision. Therefore contrary to the contention of the appellant, mere possession of the bags alone without any overt act could sufficiently constitute trafficking.

Sentence

[49] Regarding sentence, the learned trial judge found that the appellant was a mere transporter of the drugs. The learned trial judge also found the appellant had cooperated fully with the police when the bags were searched by PW3. Therefore, the learned trial judge meted out the punishment of life imprisonment with 15 strokes of whipping on the appellant.

[50] With regard to the cross-appeal on sentence, in order to impose life imprisonment with 15 strokes of whipping on the appellant, the learned trial judge must be bound by s 39B(2A) of the Act that reads:

> ... the Court in imposing the sentence of imprisonment for life and whipping of not less than fifteen strokes, may have regard only to the following circumstances:
>
> (a) there was no evidence of buying and selling of a dangerous drug at the time when the person convicted was arrested;
>
> (b) there was no involvement of agent provocateur; or
>
> (c) the involvement of the person convicted is restricted to transporting, carrying, sending or delivering a dangerous drug; and
>
> (d) that the person convicted has assisted an enforcement agency in disrupting drug trafficking activities within or outside Malaysia.

[51] What is relevant to note, both (c) and (d) of the provision above must be satisfied because of the word 'and' between (c) and (d). It must be read as conjunctive and not disjunctive. Thus, it is not sufficient for the trial judge to find the appellant was a mere transporter of the drugs. It must also be proven that the appellant had assisted an enforcement agency in disrupting drug trafficking activities within or outside Malaysia. In this regard, with respect to the learned trial judge, the appellant cooperation with the police while the bags were searched could not mean that he has assisted an enforcement agency in disrupting drug trafficking activities within or outside Malaysia. When anyone is asked by the police or any other authorities at the airport to open his or her bags, it is only normal and nothing extraordinary for that instruction to be followed. That person has practically no choice but to follow exactly that specific request. In similar fashion, in *Qui Jieru* it is said as follows:

> And the fact that she had cooperated with the authorities and did not run away should not weigh favourably for her to be considered as an innocent carrier. She had no option but to answer the questions and obey the instructions of the Customs officers. Anything less from her would only arouse more suspicion on herself. Further, in any international airports where there are security personnel and surveillance all over, she would have realised running away would not be possible and in fact pointless.

[52] And in giving the interpretation of s 39B(2A) of the Act, this case further states as follows:

> ... it is appropriate to consider the parliamentary debate in respect of this provision. In Parliament the then Honourable Minister Dato' Sri Azalina Othman Said said in response to a question posed as follows:
>
> Yang Berhormat tanya saya tentang perkataan 'and' dalam hujung s 39B(2A)(d). Dasar yang telah ditentulah ialah supaya perenggan (d) menjadi sesuatu yang kehendak kepada mandatori iaitu perlu dipenuhi sekiranya mahkamah ingin

A mempertimbangkan untuk menjatuhkan hukuman penjara seumur hidup. Dalam hal ini, (a), (b) dan (c)–(a), (b), (c) dibaca secara injunctive tetapi akan dibaca secara conjunctive dengan (d). Maknanya (d) itu adalah keperluan utama untuk hakim menggunakan kuasa budi bicara.

B The Honourable Minister also said:

Kerajaan tidak bersetuju dengan penggantian perkataan 'and' dengan perkataan 'or' di akhir frasa (2A)(c). Diperhatikan bahawa terletaknya perkataan 'and' di akhir fasal (2A)(c) bermaksud mahkamah hendaklah mengambil fasal (2A)(d) secara bersama atau conjunctive dengan salah satu daripada (2A)(a), (b) atau (c)
C atau mana-mana kombinasi daripada ketiga-tiganya. Dalam kata lain, pertimbangkan terhadap fasal (2A)(d) adalah wajib dalam setiap kes di mana mahkamah membuat pertimbangan sama ada hendak menjatuhkan hukuman penjara seumur hidup dengan sebatan.

D In the Hansard the same Honourable Minister explained as follows:

Kerajaan tidak bersetuju dengan cadangan untuk mengeluarkan perkataan 'only' dalam fasal (2A) dan juga tidak bersetuju dengan pindaan hukuman yang dicadangkan. Kerajaan berpandangan bahawa pengeluaran perkataan 'only' tersebut akan membuka luas faktor-faktor yang boleh diambil kira oleh
E mahkamah dalam memutuskan hukuman. Keadaan ini juga akan membawa kepada situasi ketidakseragaman dalam hukuman sebagaimana berlakunya sebelum tahun 1983.

And the Honourable Minister also said:

F *Diperhatikan di sini bahawa faktor-faktor (a), (b) dan (c) berkaitan dengan kesalahan spesifik yang telah pun dilakukan oleh tertuduh. Hanya faktor (d) yang berkaitan dengan satu kelebihan yang boleh diperolehi agensi penguatkuasaan dalam usaha mengendalikan pengedaran dadah. Oleh itu, faktor (d) harus wajib dipertimbangkan oleh mahkamah jika niat dan semangat di sebalik pindaan ini hendak dizahirkan iaitu memperkasa agensi penguat kuasa dalam memerangi*
G *pengedaran dadah dan melindungi kepentingan masyarakat.*

In this regard, it is our finding the reference to Hansard as an aid to interpretation of a statutory provision is well settled. As such we could not see any reasons to hesitate to do the same (see the Federal Court's decisions of *Lau Keen Fai v Lim Ban*
H *Kay @ Lim Chiam Boon & Anor* [2021] 2 MLJ 8; [2012] 1 CLJ 569 and *Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345; [1997] 4 CLJ 393).

Based on the reason explained, we find that the appellant must also satisfy the provision of s 39B(2A)(d) of the Act in order to be considered for the sentence of life imprisonment.

I

[53] Similarly, our learned brother Nordin Hassan JCA gave a very clear explanation on the applicability of this statutory provision in the case of *Zaliman bin Zakaria v Public Prosecutor* [2020] MLJU 1409; [2020] 1 LNS 1259 where it states as follows:

The other important feature of s 39B(2A) is the usage of the word 'only' before paras (a), (b), (c) and (d). Therefore, the power of the court to impose the sentence of imprisonment for life and whipping of not less than fifteen strokes is to be exercise only with regard to the circumstances specified in these paragraphs and not in any other circumstances. This has also been explained by the Minister in Parliament as alluded to earlier and in the Explanatory Statement to the Dangerous Drugs (Amendment) Bill 2017.

Coming back to the provision of s 39B(2A)(d), the condition for its application is that the convicted person has assisted the enforcement agency in disrupting drugs trafficking activities within or outside Malaysia. This is a question of fact to be determined by the trial judge and one of the consideration that may be taken is the certificate in writing by the public prosecutor which certify that the convicted person has assisted an enforcement agency in disrupting drug trafficking activities. In the *Explanatory Statement to the Dangerous Drugs (Amendment) Bill 2017 (DR 45/2017)*, it states:

> The proposed amendment also seeks to revert to the position prior to the enactment of Act A553, where cl 2 seeks to amend sub-s 39B(2) of Act 234 to empower a court to impose a punishment of death or imprisonment for life and whipping of not less than fifteen strokes for the offence of drug trafficking. However, *in imposing the punishment of imprisonment for life and whipping of not less than fifteen strokes, the court may have regard to any of the circumstances specified in the proposed new para 39B(2A)(a), (b), (c) and the court shall have regard to a certification in writing by the public prosecutor that in the public prosecutor's determination the person convicted under sub-s 39B(2) has assisted an enforcement agency in disrupting drug trafficking activities within or outside Malaysia.* (Emphasis added.)

In the present case, no evidence was adduced during trial that the appellant had assisted the enforcement agency in disrupting drug trafficking activities within or outside Malaysia and also no certification by the public prosecutor in writing was produced to that effect. The trial judge in imposing the sentence of imprisonment for life against the appellant has failed to consider the mandatory requirement under para (d) of s 39B(2A) of the DDA 1952. Clearly this requirement has not been fulfilled for the imposition of imprisonment for life and 15 strokes of whipping. This error by the trial judge warrants the intervention of this court.

[54] Having regard to the explanation above, similarly, there is no certification from the public prosecutor for the appellant in the present appeal that he has assisted an enforcement agency in disrupting drug trafficking activities within or outside Malaysia. Neither the facts in the present appeal, in the absence of such certification, show that the appellant had in any manner assisted an enforcement agency in disrupting drug trafficking activities within or outside Malaysia.

[55] Hence, we are of the considered view that the appellant should not be sentenced to life imprisonment with 15 strokes of whipping but must be meted

out the death penalty pursuant to s 39B(2) of the Act upon conviction.

CONCLUSION

[56] As alluded, we have considered the findings and reasons given by the learned trial judge in convicting the appellant for the amended charge. We could not say that the learned trial had erred in anyway in the findings and reasoning made in respect of conviction. For the reasons explained too, with respect, we do not find any merits on the grounds forwarded for the appellant's appeal. Hence we are unanimous in affirming the conviction for the amended charge against the appellant.

[57] However, in respect of sentence, we agree there are merits for the cross-appeal by the respondent. We have also explained why the sentence imposed by the learned trial judge could not stand. Hence we are also unanimous that based on the reasons highlighted, the sentence of life imprisonment with 15 strokes of whipping must be replaced and substituted with the death penalty against the appellant.

[58] Accordingly, we order that the appellant's appeal against conviction and sentence be dismissed and the respondent's cross-appeal against sentence be allowed.

Appeal dismissed and cross-appeal against sentence allowed.

Reported by Nabilah Syahida Abdullah Salleh